

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html>

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY PERSON UNDER THE AGE OF 18 YEARS WHO IS A COMPLAINANT OR WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html>

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 29/2026
[2026] NZSC 107**

BETWEEN CS (SC 29/2026)
Applicant

AND THE KING
Respondent

Court: Ellen France and Kós JJ

Counsel: S J Galler for Applicant
M K Regan for Respondent

Judgment: 14 August 2026

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal convictions for historic, serious sexual offending against a family member when she was between six and 11 years of age. The proposed appeal would reprise the argument made unsuccessfully to the Court of Appeal that admission of the content of a telephone call between the complainant and the applicant, covertly recorded with police advice and assistance, was inadmissible

and resulted in a miscarriage of justice.¹ As the evidence was adduced without objection in an agreed statement of facts, the application also raises a potential question of trial counsel error.

[2] In our view, the ultimate question of whether there is a risk of miscarriage from the admission of the evidence is dispositive.² We accept there is an available argument that the recording was inadmissible under the principles suggested by the Court of Appeal in *Elliot v R*.³ Likewise, whether the test under *Elliot* is resolved by deciding that a recording is “not plainly inadmissible”,⁴ and the appropriate basis on which evidence admitted by agreement at trial may be challenged on appeal, may benefit from clarification, among other matters raised by the applicant.⁵

[3] The proposed appeal is not an appropriate vehicle to decide any of these matters, however. That is because one week after the recording was made, the applicant gave a voluntary police interview.⁶ In our view, the inferences that might be drawn by a jury as to admissions of offending made in that interview are either co-extensive with those that might be drawn from the recording, or not materially different in substance. It is unsurprising, therefore, that very experienced defence counsel at trial opted not to object to introduction of the recording in an agreed statement of facts. Arguably, it was unfair for that interview to take place without the police advising the applicant of the fact of the recording, but the application does not turn on that, and at the end of the day it makes no practical difference.

[4] It follows there was no real risk here that the outcome of the trial was affected by admission of the recording. The criteria for leave in this Court are not therefore met.⁷

¹ *A (CA210/2025) v R* [2026] NZCA 11 (Cooke, Walker and Cull JJ) [CA judgment]. The content of the recording is set out at [30]–[37] of that judgment.

² Criminal Procedure Act 2016, ss 232(2)(c) and 240(2).

³ *Elliot v R* [2025] NZCA 410.

⁴ See CA judgment, above n 1, at [61].

⁵ See at [52] citing *R v P* [1996] 3 NZLR 132 (CA) and *R v Horsfall* [1981] 1 NZLR 116 (CA).

⁶ The content of the police interview is set out at [39]–[41] of the CA judgment, above n 1.

⁷ Senior Courts Act 2016, s 74(1) and (2).

Result

[5] The application for leave to appeal is dismissed.

Solicitors:

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent